

Introduced by Senator Bowen

December 2, 2002

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Section 17538.4 of, the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 12, as introduced, Bowen. Electronic mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on all unsolicited e-mailed documents, as specified, and prohibits the e-mailing of any unsolicited documents to a person who has requested not to receive any further unsolicited documents. Existing law requires unsolicited e-mail advertisements to contain a heading of "ADV:" or "ADV:ADLT," as specified.

This bill would remove these provisions and would instead prohibit the sending, as defined, of unsolicited commercial e-mail advertisements from California or to a California electronic mail address. The bill would provide that if any part of these provisions or their application are held invalid, the invalidity shall not effect the other provisions or applications that can still be given effect.



This bill would also provide that if any of the above provisions or applications are held invalid, alternative provisions would become effective. The alternative provisions would require the sender of an unsolicited commercial e-mail advertisement to maintain a functioning return e-mail address for requests not to receive further advertisements, and would also require the advertisement to include specified notification regarding making such a request. The alternative provisions would also prohibit a person from initiating transmission of an unsolicited commercial e-mail advertisement either from California or to a California e-mail address in certain circumstances. The alternative provisions would require that a commercial e-mail advertisement include “ADV:” or “ADV:ADLT” in the title of the e-mail, depending on the content of the advertisement. The alternative provisions would make it unlawful for a person to sell or provide a list of e-mail addresses to be used to initiate the transmission of unsolicited commercial e-mail advertisements from California or to a California e-mail address.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of any of these provisions to bring an action to recover the greater of actual damages or \$500 per individual violation, and reasonable costs and attorney’s fees. The bill would authorize the court to increase the award to up to triple this amount if the violation was willful or knowing. The bill would provide that any cause of action in existence prior to its enactment would not be affected by the act and would be governed by the law in effect at the time it arose.

A violation of the provisions governing advertising is a misdemeanor. Because a violation of the provisions of this bill would be a crime, the bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.



The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions on Unsolicited Commercial E-mail
Advertisement

17529. For the purpose of this title, the following definitions apply:

(a) “California electronic mail address” means any of the following:

(1) An electronic mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that electronic mail address to a mailing address in this state.

(2) An electronic mail address ordinarily accessed from a computer located in this state.

(3) An electronic mail address furnished to a resident of this state.

(b) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(c) “Direct consent” means a recipient’s unambiguous expression of permission to receive a commercial e-mail advertisement of the type transmitted, where the recipient has clear and conspicuous notice of the scope of the permission, including the types of commercial e-mail advertisements and the senders or types of senders included, at the time the recipient grants that permission.

(d) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(e) “Electronic mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” includes electronic messages

1 that are transmitted through a local, regional, or global computer
2 network.

3 (f) “Electronic mail address” means a destination, commonly
4 expressed as a string of characters, to which electronic mail can be
5 sent or delivered. An “electronic mail address” may include a user
6 name or mailbox and a reference to an Internet domain.

7 (g) “Electronic mail service provider” means any person,
8 including an Internet service provider, that is an intermediary in
9 sending or receiving electronic mail or that provides to end users
10 of the electronic mail service the ability to send or receive
11 electronic mail.

12 (h) “Functioning return electronic mail address” means an
13 electronic mail address displayed in a commercial e-mail
14 advertisement that has the capacity to receive the number of reply
15 messages that the sender of the commercial e-mail advertisement
16 should reasonably expect to be transmitted by the recipients of the
17 commercial e-mail advertisement for no less than 30 days after the
18 sending of the commercial e-mail advertisement.

19 (i) “Header information” means the source, destination, and
20 routing information attached to the beginning of an electronic mail
21 message, including the originating domain name and originating
22 electronic mail address.

23 (j) “Initiate the transmission of a commercial e-mail
24 advertisement” means to transmit or cause to be transmitted a
25 commercial e-mail advertisement or assist in the transmission of
26 a commercial e-mail advertisement by providing or selecting
27 electronic mail addresses to which the advertisement may be sent,
28 but does not include the transmission of the advertisement through
29 the network or system of a telecommunications utility or an
30 electronic mail service provider.

31 (k) “Internet” has the meaning set forth in paragraph (6) of
32 subdivision (e) of Section 17538.

33 (l) “Preexisting or current business relationship,” as used in
34 connection with the sending of a commercial e-mail
35 advertisement, means either of the following:

36 (1) The recipient has purchased or leased property, goods, or
37 services from the sender and both of the following conditions are
38 met:

39 (A) The subject of the commercial e-mail advertisement
40 concerns that purchase or lease.

1 (B) The commercial e-mail advertisement is sent within 12
2 months of the purchase or lease or within any longer express
3 warranty period.

4 (2) The recipient has an ongoing contract with the sender and
5 the commercial e-mail advertisement directly concerns the
6 ongoing contract.

7 (m) “Recipient” means the addressee of a commercial e-mail
8 advertisement. If an addressee of a commercial e-mail
9 advertisement has one or more electronic mail addresses to which
10 a commercial e-mail advertisement is sent, the addressee shall be
11 deemed to be a separate recipient for each address to which the
12 advertisement is sent.

13 (n) “Sender” means a person who initiates a commercial
14 e-mail advertisement.

15 (o) “Unsolicited commercial e-mail advertisement” means a
16 commercial e-mail advertisement sent to a recipient who meets
17 both of the following criteria:

18 (1) Has not provided direct consent to receive the commercial
19 e-mail advertisement.

20 (2) Does not have a preexisting or current business relationship
21 with the sender or offeror of the property, goods, or services.

22 17529.1. (a) Notwithstanding any other provision of law, no
23 person may do either of the following:

24 (1) Initiate an unsolicited commercial e-mail advertisement
25 from California.

26 (2) Initiate an unsolicited commercial e-mail advertisement to
27 a California electronic mail address.

28 (b) The provisions of this section are severable. If any
29 provision of this section or its application is held invalid, both of
30 the following shall occur:

31 (1) That invalidity shall not affect any other provision or
32 application that can be given effect without the invalid provision
33 or application.

34 (2) Sections 17529.2 and 17529.3 shall become operative.

35 17529.2. (a) Any sender of unsolicited commercial e-mail
36 advertisements either from California or to a California electronic
37 mail address shall do all of the following:

38 (1) Maintain a functioning return electronic mail address to
39 which a recipient may send a reply indicating the recipient’s desire
40 not to receive further commercial e-mail advertisements from the

1 sender at the electronic mail address at which the message was
2 received.

3 (2) Clearly and conspicuously disclose in the commercial
4 e-mail advertisement all of the following:

5 (A) The recipient's right to decline to receive further
6 commercial e-mail advertisements at the electronic mail address
7 at which the message was received.

8 (B) The recipient's ability to decline to receive further
9 commercial e-mail advertisements by sending a message to the
10 sender's functioning return electronic mail address.

11 (C) The sender's functioning return electronic mail address.

12 (b) It is unlawful for any person to initiate the transmission of
13 an unsolicited commercial e-mail advertisement either from
14 California or to a California electronic mail address under any of
15 the following circumstances:

16 (1) The commercial e-mail advertisement contains or is
17 accompanied by a third party's domain name without permission
18 of the third party.

19 (2) The commercial e-mail advertisement contains or is
20 accompanied by falsified, misrepresented, obscured, or forged
21 header information.

22 (3) The commercial e-mail advertisement has a subject line that
23 has the capacity or tendency to mislead the public about the
24 contents of the advertisement.

25 (4) The sender is in violation of subdivision (a) or the
26 commercial e-mail advertisement does not contain the notice
27 required by subdivision (a).

28 (5) The potential recipient of the commercial e-mail
29 advertisement or a recipient of a past commercial e-mail
30 advertisement has informed the sender, by use of the functioning
31 return electronic mail address or by other electronic or written
32 means communicated to the sender, that the recipient does not wish
33 to receive commercial e-mail advertisements at that electronic
34 mail address.

35 (6) An employer has informed the sender, as provided in
36 subdivision (c), not to send further commercial e-mail
37 advertisements to designated electronic mail addresses.

38 (c) An employer who provides or has control over one or more
39 electronic mail addresses used by its employees may notify the
40 sender of an unsolicited commercial e-mail advertisement, by use



1 of the functioning return electronic mail address or by other
2 electronic or written means communicated to the sender, that no
3 further commercial e-mail advertisements should be transmitted
4 to any of the employer-provided and employer-controlled
5 electronic mail addresses.

6 (d) In addition to the prohibitions described in subdivision (b),
7 it is unlawful for any person to initiate the transmission of an
8 unsolicited commercial e-mail advertisement from California or
9 to a California electronic mail address unless all of the following
10 conditions are satisfied:

11 (1) The subject line of the commercial e-mail advertisement
12 includes “ADV:” as the first four characters.

13 (2) If the commercial e-mail advertisement is intended for the
14 purpose of the lease, sale, rental, gift offer, or other disposition of
15 any property, goods, services, or extension of credit that may only
16 be viewed, purchased, rented, leased, or held in possession by an
17 individual 18 years of age or older, the subject line of the
18 commercial e-mail advertisement shall include “ADV:ADLT” as
19 the first eight characters.

20 (e) This section shall remain inoperative until any provision of
21 Section 17529.1 or its application is held invalid, at which time this
22 section shall become operative.

23 17529.3. (a) It is unlawful for any person to sell or otherwise
24 provide a list of electronic mail addresses to be used to do either
25 of the following:

26 (1) Initiate the transmission of unsolicited commercial e-mail
27 advertisements from California.

28 (2) Initiate the transmission of unsolicited e-mail
29 advertisements to a California electronic mail address.

30 (b) This section shall remain inoperative until any provision of
31 Section 17529.1 or its application is held invalid, at which time this
32 section shall become operative.

33 17529.4. (a) In addition to any other remedies provided by
34 this article or by other provisions of law, a recipient of a
35 commercial e-mail advertisement transmitted in violation of
36 Section 17529.1, 17529.2, or 17529.3 may bring an action to
37 recover either actual damages or five hundred (\$500) dollars for
38 each individual violation, whichever is greater, and may also
39 recover reasonable costs and attorney’s fees.

(b) If the court finds that the violation was willful or knowing, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount available under subdivision (a).

17529.9. The remedies provided for in this article are in addition to, and not in lieu of, any other remedies provided for by law.

SEC. 2. Section 17538.4 of the Business and Professions Code is repealed.

~~17538.4. (a) No person or entity conducting business in this state shall facsimile (fax) or cause to be faxed, or electronically mail (e-mail) or cause to be e-mailed, documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless:~~

~~(1) In the case of a fax, that person or entity establishes a toll-free telephone number that a recipient of the unsolicited faxed documents may call to notify the sender not to fax the recipient any further unsolicited documents.~~

~~(2) In the case of e-mail, that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents.~~

~~(b) All unsolicited faxed or e-mailed documents subject to this section shall include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail, as the case may be, notifying the sender not to fax or e-mail the recipient any further unsolicited documents to the fax number, or numbers, or e-mail address, or addresses, specified by the recipient.~~

~~In the case of faxed material, the statement shall be in at least nine-point type. In the case of e-mail, the statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.~~

~~(c) Upon notification by a recipient of his or her request not to receive any further unsolicited faxed or e-mailed documents, no person or entity conducting business in this state shall fax or cause to be faxed or e-mail or cause to be e-mailed any unsolicited documents to that recipient.~~

~~(d) In the case of e-mail, this section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes "electronic mail service provider" means any business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.~~

~~(e) As used in this section, "unsolicited e-mailed documents" means any e-mailed document or documents consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:~~

~~(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.~~

~~(2) The documents are not sent at the request of, or with the express consent of, the recipient.~~

~~(f) As used in this section, "fax" or "cause to be faxed" or "e-mail" or "cause to be e-mailed" does not include or refer to the transmission of any documents by a telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network.~~

~~(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, the subject line of each and every message shall include "ADV:" as the first four characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each and every message shall include "ADV:ADLT" as the first eight characters.~~

~~(h) An employer who is the registered owner of more than one e-mail address may notify the person or entity conducting business in this state e-mailing or causing to be e-mailed, documents consisting of unsolicited advertising material for the lease, sale,~~

1 ~~rental, gift offer, or other disposition of any realty, goods, services,~~
2 ~~or extension of credit of the desire to cease e-mailing on behalf of~~
3 ~~all of the employees who may use employer-provided and~~
4 ~~employer-controlled e-mail addresses.~~

5 ~~(i) This section, or any part of this section, shall become~~
6 ~~inoperative on and after the date that federal law is enacted that~~
7 ~~prohibits or otherwise regulates the transmission of unsolicited~~
8 ~~advertising by electronic mail (e-mail).~~

9 SEC. 3. Any cause of action that is in existence before the
10 effective date of this act shall not be affected by this act, but shall
11 instead be governed by the law that was in effect at the time the
12 cause of action arose.

13 SEC. 4. No reimbursement is required by this act pursuant to
14 Section 6 of Article XIII B of the California Constitution because
15 the only costs that may be incurred by a local agency or school
16 district will be incurred because this act creates a new crime or
17 infraction, eliminates a crime or infraction, or changes the penalty
18 for a crime or infraction, within the meaning of Section 17556 of
19 the Government Code, or changes the definition of a crime within
20 the meaning of Section 6 of Article XIII B of the California
21 Constitution.

